

Joshua L. Thomas, Esq.
Joshua L. Thomas & Associates
225 Wilmington-West Chester Pike, Suite 200
Chadds Ford, PA 19317
Phone: 215-806-1733
Fax: (888) 314-8910
Email: JoshuaLThomas@gmail.com
Atty ID# 312476

JAMES EVERETT SHELTON

Plaintiff

v.

FCS CAPITAL LLC, ET AL.
Defendants

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

No. 2:18-cv-03723-NIQA

**DEFENDANTS' FCS CAPITAL LLC, EMIL YASHAYEV, BARRY SHARGEL,
(DEFENDANTS) ANSWER**

/s/ Joshua Thomas
Joshua L. Thomas and Associates
Joshua Thomas Esq.
Supreme Court ID No. 003992012
225 Wilmington-West Chester Pike
Suite 200
Chadds Ford, PA 19317
Phone: (215) 806-1733
Email: JoshuaLThomas@gmail.com

Defendants, respectfully submit through its undersigned counsel, herein files its Answer with Affirmative Defenses to the Amended Complaint filed by Plaintiff, and states as follows:

I. Introduction

1. Admitted in part, denied in part. Defendants admit the TCPA was enacted in response to widespread public outrage in regards to individuals, but not businesses or serial litigators. As to the rest, Defendants deny the remainder of the allegations.
2. Admitted in part, denied in part. Admitted that the TCPA prohibits the use of an ATDS for a cellular phone in some instances, but not all. In the recent case, *Shelton v. Target Advance LLC*, No. 18-2070, 2019 U.S. Dist. LEXIS 64713 (E.D. Pa. Apr. 16, 2019). Specifically, the court ruled that **this Plaintiff** 1) did not have standing to sue for calls to cell phones made with an ATDS if they post that cell number online solely for the purpose of drumming up TCPA lawsuits and 2) that if a cell number is used for business purposes, a plaintiff will not likely have standing to sue for calls to that cell number based upon violations of the TCPA's separate National Do-Not-Call Registry ("DNC") rules. As to the rest, Defendants deny the remainder of the allegations.
3. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants deny the remainder of the allegations and leave Plaintiff to his proofs.
4. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants deny the remainder of the allegations and leave Plaintiff to his proofs.

5. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants deny the remainder of the allegations and leave Plaintiff to his proofs.
6. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.

II. Jurisdiction and Venue

7. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
8. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
9. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.

III. Parties

10. Admitted in part, denied in part. Admitted Plaintiff is an individual. As to the rest, denied. Plaintiff is actually a serial litigant, who has “formulated a business model to encourage telemarketers to call his cellphone number so that he can later sue the telemarketers under the TCPA.” See *Shelton v. Target Advance LLC*, No. 18-2070, 2019 U.S. Dist. LEXIS 64713 (E.D. Pa. Apr. 16, 2019). This is similar to *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782 (W.D. Pa. 2016), in which the court found that the plaintiff lacked standing to sue because she had purchased at least 35 cell phones “with the specific intent of receiving robocalls so that she could thereafter bring lawsuits under the TCPA,” and did not use those cell phones “for any other purpose.” Defendants leave Plaintiff to his proofs.

11. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.
12. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.
13. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.
14. Admitted.
15. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.
16. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.
17. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.
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19. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.
20. Denied. This paragraph contains gross factual misrepresentations that are not accurate or related to reality. Defendants leave Plaintiff to his proofs.

Background

The Telephone Consumer Protection Act

21. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.

The TCPA's Prohibition of Automated Telemarketing Calls

- 22. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
- 23. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
- 24. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
- 25. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.

The National Do Not Call Registry

- 26. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
- 27. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.

The TCPA imposes personal liability on individuals who participate in or commission telemarketing calls.

- 28. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
- 29. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
- 30. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.

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**Pennsylvania's Unfair Trade Practices and
Consumer Protection Law and Pennsylvania's Telemarketer Registration Act**

36. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.
37. Denied. This paragraph contains a legal conclusion and therefore, needs no further response. Defendants leave Plaintiff to his proofs.

Factual Allegations

38. Denied. In the recent case, *Shelton v. Target Advance LLC*, No. 18-2070, 2019 U.S. Dist. LEXIS 64713 (E.D. Pa. Apr. 16, 2019). Specifically, the court ruled that **this Plaintiff** 1) did not have standing to sue for calls to cell phones made with an ATDS if they post that cell number online solely for the purpose of drumming up TCPA lawsuits and 2) that if a cell number is used for business purposes, a plaintiff will not likely have standing to sue for calls to that cell number based upon violations of the

TCPA's separate National Do-Not-Call Registry ("DNC") rules. Further, in that case the court concluded that **this** Plaintiff lacked standing to sue for violations of the TCPA's DNC provisions. It found that Plaintiff lacked standing to bring claims predicated on the TCPA's prohibition against sales calls to telephone numbers listed on the DNC because the cell number at issue was "also for business use, and business numbers are not permitted to be registered on the National Do Not Call Registry." The court went on, explaining that "because Plaintiff held the Phone Number out to the world as a business phone number, he could not register it on the National Do Not Call Registry for purposes of avoiding business-to-business calls, such as those giving rise to this action."

39. Denied. This paragraph contains factual misrepresentations that are not accurate or legal conclusions masquerading as "facts". Defendants leave Plaintiff to his proofs.
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128. Denied. This paragraph contains factual misrepresentations that are not accurate or legal conclusions masquerading as “facts”. Defendants leave Plaintiff to his proofs. In reality, this was actually Plaintiff immediately waiving all of his purported rights for the do not call list, and actively continuing a conversation he claims he did not want.
129. Denied. This paragraph contains factual misrepresentations that are not accurate or legal conclusions masquerading as “facts”. Defendants leave Plaintiff to his proofs.
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JACOVETTI’S LIABILITY AND HIS ARRANGEMENT WITH FCS

149. Denied. This paragraph contains factual misrepresentations that are not accurate or legal conclusions masquerading as “facts”. Defendants leave Plaintiff to his proofs.
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- 162. Denied. This paragraph contains factual misrepresentations that are not accurate or legal conclusions masquerading as “facts”. Defendants leave Plaintiff to his proofs.

First Cause of Action

- 163. Denied this is an incorporation paragraph and as such, no response required.
- 164. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and

any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.

165. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.

Second Cause of Action

166. Denied this is an incorporation paragraph and as such, no response required.
167. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.
168. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.

Third Cause of Action

169. Denied this is an incorporation paragraph and as such, no response required.
170. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.
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Fourth Cause of Action

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Fifth Cause of Action

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176. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.

Sixth Cause of Action

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178. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.

Seventh Cause of Action

179. Denied this is an incorporation paragraph and as such, no response required.
180. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.

Eighth Cause of Action

181. Denied this is an incorporation paragraph and as such, no response required.
182. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and any allegation of wrongdoing against the Defendants is denied. Defendants leave Plaintiff to his proofs.

Ninth Cause of Action

183. Denied this is an incorporation paragraph and as such, no response required.
184. Denied. The allegations in the corresponding paragraph are legal argument or legal conclusions for which no response is required. TO the extent that a response is deemed required, they are denied. Defendants did not commit any wrongdoing in connection with any of the aforementioned facts or otherwise as Plaintiff alleged and

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Wherefore, Defendants Respectfully request that the Plaintiff's Amended Complaint be dismissed with prejudice, and that the court issue such other relief as it deems just and proper.

/s/ Joshua Thomas
Joshua L. Thomas and Associates
Joshua Thomas Esq.
Supreme Court ID No. 312476
225 Wilmington-West Chester Pike
Suite 200
Chadds Ford, PA 19317
Phone: (215) 806-1733
Email: JoshuaLThomas@gmail.com

AFFIRMATIVE DEFENSES

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1. The Complaint fails to state a cause of action upon which relief may be granted.
2. Plaintiff's claims are barred by the doctrine res judicata and collateral estoppel.
3. Plaintiff's claims are barred, in whole or in part, by the applicable statute of limitations.
4. Plaintiff lacks standing to sue.
5. Plaintiff's claims are barred by the equitable doctrine of unclean hands, fraud, illegality, collusion, and conspiracy.
6. To the extent that Plaintiff did sustain any damages, which Defendant denies, such damages were caused, in whole or in part, by the comparative fault of Plaintiff and /or third parties.
7. Plaintiff has acted illegally and improperly at all relevant times and Plaintiff is therefore barred from any relief whatsoever.
8. Plaintiff's claims are barred because Plaintiff would be unjustly enriched if allowed to recover all or any part of the damages or remedies alleged in the Amended Complaint.
9. That upon information and belief, the claim which is the subject matter of the cause of action set forth in the Amended Complaint in the above entitled action is prohibited by and contravenes the statutory law and public policy of the state of New Jersey and/ or Federal law by reason of the fact that the underlying claim violates the usury laws and/or any State of New Jersey or Federal ordinance law or codified statute.

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